Supreme Court, U.S.
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No. 10-135

JUL 26 2010

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In The
Supreme Court of the United States

B.R. HUDSON, in his individual capacity,

Petitioner,

v.

HILARIE G. SCARBRO, Administratrix of the Estate of Gary Eugene Rummer,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, a federal District Court Judge – with training and expertise in United States constitutional law – looked at the entire summary judgment record and all relevant case authority, and concluded that, in the light most favorable to plaintiff and as a matter of law, Officer Hudson's actions did not violate the Constitution. The Fourth Circuit panel judges disagreed with the District Court Judge, and concluded that, in the light most favorable to plaintiff, Officer Hudson's actions and/or inactions did violate the Constitution. The Fourth Circuit panel then went a step further, and held that Officer Hudson was not entitled to qualified immunity, even though a reasonable federal judge had held that Officer Hudson's actions did not violate the Constitution.

The question presented here is:

1. Whether, absent a finding that the district court's opinion was unreasonable, a government official is entitled to qualified immunity under the "clearly established" prong of the test set out in Saucier v. Katz, 533 U.S. 194 (2001), if the district court and the court of appeals disagree over whether the government official's conduct violated the constitution.

2. Whether district court opinions should be considered by courts of appeal in determining whether a right is clearly established for purposes of qualified immunity analysis.

PARTIES TO THE PROCEEDING

The petitioner in this case is Officer B. R. Hudson in his individual capacity. Officer Hudson, at the time of the incident in question, was a detention officer at the New Hanover County Jail in New Hanover County, North Carolina.

The plaintiff in this case is Hilarie G. Scarbro, as Administratrix of the Estate of Gary Eugene Rummer.

The only two remaining parties to this action are those listed above.

However, the following were parties in the District Court and the United States Court of Appeals for the Fourth Circuit, but are no longer parties to this action: New Hanover County; New Hanover County Sheriff's Department; New Hanover County Jail; Sidney A. Causey, individually and in his capacity as Sheriff of New Hanover County; J.T. Leonard, individually and in his official capacity as detective of the New Hanover County Sheriff's Department; E. Morton, individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; T.L. Fuss, individually and in his official capacity as corporal of the New Hanover County Sheriff's Department; D.E. Keyes, individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; Mr. Hansen, individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; J.P. Hatch, individually and in his official capacity as sergeant of the New Hanover

County Sheriff's Department; M. Grimes, individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; Mr. Ward, individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; S. Jones, individually and in his official capacity as sergeant of the New Hanover County Sheriff's Department; W. Thomas Parker, individually and in his official capacity as chief deputy of the New Hanover County Sheriff's Department; Clarence A. Hayes, individually and in his official capacity as captain of the New Hanover County Sheriff's Department; Angela Goebel, Deputy, individually and/or in her official capacity; Dennis Kutrow, Deputy, individually and/or in his official capacity; Deputy Drakow, Deputy Sheriff, individually and in his official capacity; Deputy Frink, Deputy Sheriff, individually and in his official capacity; Susan Barfield, R.N., individually and in her official capacity; Gaysheron Bell, Deputy, individually and in her official capacity as an employee of the New Hanover County Health Department; New Hanover County Health Department; Janet McCumbie, individually and in her official capacity as Personal Health Director of the New Hanover County Health Department; Penny Rayner, FNP, individually and in her official capacity; and David Rice, individually and in his official capacity as Health Director of the New Hanover County Health Department.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit that gave rise to this decision is unpublished, and is reproduced in the Appendix filed herewith ("App.") at App. 1-16. The unreported opinion of the District Court in this case is reproduced at App. 22-58.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on April 1, 2010. The Fourth Circuit denied a petition for rehearing on April 27, 2010. (App. 19-21). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The plaintiff, Hilarie G. Scarbro as Administratix of the Estate of Gary Eugene Rummer, filed this action against various officers of the New Hanover County Sheriff's Department and New Hanover County Health Department concerning the death of an inmate, Gary Eugene Rummer, following his incarceration at the New Hanover County Jail. The plaintiff asserted claims under 42 U.S.C. § 1983 for excessive force; deliberate indifference to serious medical needs; conspiracy; and supervisory liability. The plaintiff's complaint also included supplemental state law claims.

The District Court Judge dismissed plaintiff's claims against most of the defendants, and later granted summary judgment in favor of the remaining defendants, including defendant B.R. Hudson.

In granting summary judgment for defendant Hudson in his individual capacity as to plaintiff's Section 1983 claim for deliberate indifference to a serious medical need, the District Court Judge examined the entire summary judgment record and Fourth Circuit authority, and held that under the facts of this case, in the light most favorable to plaintiff, Hudson's actions or inactions did not violate the United States Constitution. (App. 44-52). (See panel opinion at footnote 4). ("The district court...found no constitutional violation....") (App. 9).

More specifically, in granting summary judgment in favor of defendant Hudson as to

plaintiff's Section 1983 claim for deliberate indifference to a serious medical need, the United States District Court Judge noted that the plaintiff's argument was that "by failing to give complete answers or volunteer information in response to nurse Barfield's questions, defendant Hudson deliberately interfered with Rummer's care." (App. 45). The United States District Court Judge noted that Hudson told the nurse that Rummer "did not fall." (App. 46). The United States District Court Judge analyzed Fourth Circuit authority, including Young v. City of Mt. Rainier, 238 F.3d 567 (4th Cir. 2001); Grayson v. Peed, 195 F.3d 692 (4th Cir. 1999), cert. denied, 529 U.S. 1067 (2000); and Belcher v. Oliver, 898 F.2d 32 (4th Cir. 1990) (App. 47-51), and reasonably concluded that "defendant Hudson, as a non-medical staff member with no apparent medical training, acted reasonably when he submitted Rummer to trained medical professionals" (App. 47-48) and that "[i]n accordance with relevant law, upon the undisputed facts...Defendant Hudson's affirmative actions in delivering Rummer to receive medical care relieved him of responsibility" (App. 50), and that under the "relevant case law," Officer Hudson had no "affirmative duty to volunteer unrequested information under the circumstances presented." (App. 50-51). Accordingly, as to plaintiff's Section 1983 claim for deliberate indifference to medical needs against Hudson in his individual capacity, the United States District Court Judge (after examining the entire record and relevant case authority) held that under the facts of this case, Hudson's actions and/or inactions did not violate the Constitution. (App. 9, 44-52).

The plaintiff filed a notice of appeal, and oral argument was held.

On April 1, 2010, the Fourth Circuit panel opinion was issued in this case. The panel affirmed judgment in favor of most defendants as to most claims. However, the panel reversed as to one defendant on one claim: The panel reversed as to plaintiff's Section 1983 claim for deliberate indifference to a serious medical need against defendant Hudson in his individual capacity. In reversing the United States District Court's grant of summary judgment in favor of Officer Hudson as to plaintiff's Section 1983 claim for deliberate indifference to a serious medical need, the panel opinion did not analyze or discuss the Fourth Circuit cases relied upon by the United States Court Judge, but instead analogized Officer Hudson's action of taking the inmate to a medical care provider in the instant case to the officer's action in Gordon v. Kidd, 971 F.2d 1087 (4th Cir. 1992) of transferring custody of an inmate to another officer who was not a medical care provider. (App. 12-13). The panel opinion, citing Gordon, held that in the light most favorable to plaintiff, Officer Hudson's actions and/or inactions violated the Constitution. (App. 11-12). The panel opinion then went a step further. Even though the District Court Judge believed and held that Officer Hudson's actions an/or inactions were lawful and did not violate the Constitution, the panel opinion held that Officer Hudson was not entitled to qualified immunity because, according to the panel opinion, no reasonable officer could have believed that Hudson's actions were lawful. (App. 12-13).

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT PANEL OPINION IS IN CONFLICT WITH SUPREME COURT AUTHORITY

In this case, a reasonable federal District Court Judge – with training and expertise in constitutional law – looked at the entire summary judgment record and relevant case authority, and concluded that Officer Hudson's actions did not violate the Constitution. As shown by the discussion below, given that a federal District Court Judge held that Officer Hudson's actions were lawful, it cannot be said that Officer Hudson violated clearly established law; it cannot be said that Officer Hudson had "fair warning" that his conduct was unconstitutional; it cannot be said that Officer Hudson was "plainly incompetent or...knowingly violate[d] the law"; and it is manifest that since a reasonable federal judge believed that Officer Hudson's actions were constitutional, a reasonable officer could have believed that Officer Hudson's actions were constitutional. In short, as shown below, the Fourth Circuit panel misapplied basic tenets of qualified immunity as set forth by this Court; thus, the Fourth Circuit panel opinion is in direct conflict with Supreme Court authority relating to the doctrine of qualified immunity.

The doctrine of qualified immunity exists to protect law enforcement officers and other governmental officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights

of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). It "balances two important interests – the need to hold public official accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). Therefore "[q]ualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." Id. at 816. In order to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). In other words, "in the light of pre-existing law the unlawfulness must be apparent." Id.

The United States Supreme Court has emphasized that if reasonable federal judges disagree on a constitutional question, an officer will be entitled to qualified immunity because, if reasonable judges disagree on a constitutional question, the constitutional question cannot be said to be "clearly established." Thus, in Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692 (1999), this Court, in recognizing that an officer was entitled to qualified immunity, stated that "[i]f judges...disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of a controversy." 526 U.S. at 618, 119 S. Ct. at 1701. Similarly, in Pearson v. Callahan, 129 U.S. 808 (2009), this Court, quoting Wilson v. Layne, held

that officers were entitled to qualified immunity where there was a "divergence of views" among federal judges on a constitutional question because "[i]f judges...disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of a controversy." 129 S. Ct. at 828. Thus, under the clear language and reasoning of this Court, an officer is entitled to qualified immunity if reasonable judges disagree on whether the officer's conduct violates the Constitution. Wilson, supra.; Pearson, supra.

The Court's reasoning on this issue is logical, sound, and clear: If a reasonable judge, trained and experienced in the nuances of constitutional law, believes and holds that an officer's actions did not violate the Constitution, then it necessarily follows that a reasonable officer – untrained in the nuances of constitutional law – could have believed that his actions did not violate the Constitution. Put another way, if a federal judge – with training and expertise in constitutional law – holds that an officer's actions did not violate the Constitution, then, as a matter of law, it cannot be said that it was clearly established that the officer's action did violate the Constitution. In order words, if a reasonable federal district court judge holds that an officer's actions are constitutional, then it is not possible to say that the officer violated clearly established law.

In this case, despite a disagreement between reasonable jurists over whether Officer Hudson's actions were constitutional, the Court of Appeals denied Officer Hudson the protections of qualified immunity. The District Court's judgment in Officer

Hudson's favor was based upon a review of a variety of cases from the Fourth Circuit and its independent assessment that the plaintiff failed to produce a forecast of evidence sufficient to show that Hudson violated Rummer's constitutional rights. On appeal, the Fourth Circuit panel found not only that a constitutional violation occurred, but also denied Officer Hudson the protections of qualified immunity.

The disagreement between the District Court Judge and the Fourth Circuit panel judges was not over the facts of the case or what law applied, but instead over whether Fourth Circuit precedent established that Officer Hudson's conduct violated the constitution. The District Court Judge held that Fourth Circuit precedent on this issue demonstrated that Officer Hudson's conduct was constitutional. The Fourth Circuit panel held that Officer Hudson's conduct was unconstitutional and that the law on this issue was clearly established.

However, if federal judges – who are presumably more knowledgeable about the contours of constitutional rights than a detention officer at the New Hanover County Jail – disagree over whether an officer's actions violated the Constitution, then, as a matter of law, it cannot be said that it was clearly established that the officer's actions did violate the Constitution.

The reasons for this rule follow logically and directly from numerous holdings of this Court. As this Court has repeatedly emphasized, "if officers of reasonable competence could disagree [on whether

an officer's action is constitutional], immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986). Thus, this Court has stated that an officer is entitled to qualified immunity if the officer "could have believed...that his conduct was lawful." Saucier v. Katz, 533 U.S. 194, 199, 121 S. Ct. 215 (2001); See Wilson v. Layne, 526 U.S. 603, 615, 119 S. Ct. 1692 (1999); Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534 (1991). Similarly, if reasonable federal judges disagree on whether an officer's action is constitutional, then the law cannot be said to be clearly established, and the officer is necessarily entitled to qualified immunity. If a reasonable federal judge – trained in constitutional law – believes and holds that an officer's actions did not violate the Constitution, then it is manifest that the officer, who has no legal training, "could have believed...that his conduct was lawful." Saucier, supra.

As this Court stated in Ryder v. United States, 515 U.S. 177, 115 S. Ct. 2031 (1995), qualified immunity "specially protects public officials from damages liability for judgment calls made in a legally uncertain environment...." 515 U.S. at 178, 115 S. Ct. at 2033. Moreover, as this Court has made clear, qualified immunity protects an officer for damages unless existing case law gave the officer "fair warning" that his conduct violated the Constitution. See Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); United States v. Lanier, 520 U.S. 259, 270-71, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). "Hindsight-based reasoning "is forbidden in analyzing the issue of

qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 535, 105 S. Ct. 1086 (1985). In the case where, as here, reasonable judges disagree over whether the officer's conduct violated the Constitution, then the legal environment is by definition "legally uncertain." Thus, Officer Hudson is entitled to qualified immunity, because qualified immunity "specially protects public officials from damages liability for judgment calls made in a legally uncertain environment...." Ryder, supra. Moreover, if a federal judge – trained and experienced in constitutional law – reviews the entire summary judgment record and concludes that the officer's actions did not violate the Constitution, then it cannot be said that the officer had "fair warning" that his actions did violate the Constitution. To argue otherwise turns logic on its head. Thus, where, as here, a federal judge holds that the officer's conduct did not violate the Constitution, it cannot be maintained that the officer had "fair warning" that his conduct did violate the Constitution. Thus, Office Hudson is entitled to qualified immunity because existing case law did not give him "fair warning" that his actions violated the Constitution. Hope v. Pelzer, supra.

Moreover, the United States Supreme Court has clearly held that qualified immunity gives public officers "ample room for mistaken judgments" because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Hunter v. Bryant, 502 U.S. 224, 229, 112 S. Ct. 534 (1991), quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). See also Saucier v. Katz, 533 U.S. 194, 202, 121 S.

Ct. 2151 (2001). In the instant case, a federal District Court Judge analyzed the entire summary judgment record and relevant case law, and concluded that Officer Hudson's actions did not violate the Constitution. Where, as in this case, a reasonable federal judge concludes that Officer Hudson's actions were constitutional, it cannot be said that Officer Hudson's belief that his actions were constitutional were either "plainly incompetent" or in knowing violation of the law. To hold otherwise would place law enforcement officers in an untenable position: It would require officers to be more knowledgeable in the contours and nuances of constitutional law than federal judges. Logically, where, as here, a federal judge holds that an officer's actions did not violate the Constitution, the officer must necessarily be protected by qualified immunity unless the federal District Court Judge is held to be "plainly incompetent" or unless it is held that the federal District Court Judge knowingly misstated the law. There has been no such holding in this case, nor could there be such a holding. In this case, the federal District Court Judge reviewed the entire summary judgment record and applicable case law, and reasonably concluded that Officer Hudson did not violate the Constitution. Since a reasonable federal judge believed and held that Officer Hudson's actions were lawful, it cannot be said that Officer Hudson's belief in the lawfulness of his conduct was "plainly incompetent" or that he "knowingly violate[d] the law." Hunter, supra. Thus, the Fourth Circuit panel opinion is in direct conflict with finding Supreme Court authority.

The Fourth Circuit panel should have either affirmed the District Court's decision granting qualified immunity to Officer Hudson on the ground that the law was not clearly established, or explained why the District Court's interpretation of pre-existing case authority was unreasonable. The Fourth Circuit panel's failure to address – or even acknowledge – the disagreement between reasonable judges, and to deny qualified immunity to Officer Hudson, is in direct conflict with United States Supreme Court jurisprudence on qualified immunity.

In sum, the Fourth Circuit panel opinion is in conflict with applicable Supreme Court authority regarding the basic tenets of the doctrine of qualified immunity. This Court has clearly stated that an officer will be entitled to qualified immunity "if judges...disagree on a constitutional question...." Wilson, supra; Pearson, supra. The Fourth Circuit panel opinion ignored this directive. This Court has also held that an officer will be entitled to qualified immunity if the officer "could have believed...that his conduct was lawful." Saucier, supra. The Fourth Circuit panel failed to follow this Supreme Court directive. The Fourth Circuit panel also failed to follow the Supreme Court's mandate that an officer will be entitled to qualified immunity unless he had "clear warning" that his conduct was unlawful, and the directive that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley, supra. Thus, the petition for writ of certiorari should be granted.

II. THE FOURTH CIRCUIT PANEL OPINION CONFLICTS WITH DECISIONS OF A NUMBER OF UNITED STATES COURTS OF APPEAL AND THERE IS MUCH CONFLICT AND CONFUSION AMONG THE COURTS OF APPEAL REGARDING THIS ISSUE

The Supreme Court should grant certiorari in this case to address the uncertainty that exists in the lower courts about the role of district court opinions in determining whether a point of law is clearly established. The uncertainty appears to be even greater where, as here, a District Court Judge finds no constitutional violation on the specific facts of the case, and a circuit panel disagrees with the District Court Judge's conclusion that there was no constitutional violation. The federal circuits have dealt with the issue (of how to deal with District Court opinions in the qualified immunity analysis) in a variety of ways, leaving the law in this area uncertain and unsettled. Government officials across the country should be provided with a uniform understanding of when law is clearly established and this case provides the appropriate vehicle to do so.

A. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO ADDRESS AN ISSUE THE SUPREME COURT HAS DECLINED TO ADDRESS AT LEAST TWICE BEFORE

The Supreme Court has explicitly declined to address this issue in the past. In Procunier v.

Navarette, 434 U.S. 555, 565, 98 S. Ct. 855, 861, 55 L. Ed. 2d 24 (1978), the Court declined to inform the lower courts whether the clearly established prong should be "evaluated by reference to the opinions of this Court, of the Courts of Appeal, or of the local District Court[.]" Several years later the Court reiterated this position in Harlowe v. Fitzgerald, 457 U.S. 800, 818 n.32, 102 S. Ct. 2727, 2738 n.32, 73 L. Ed. 2d 396 (1981).

This case presents an appropriate vehicle to address this matter because it presents a pure legal issue: the impact of District Court Judge's decision that an officer's actions did not violate the constitution on a Court of Appeals panel's later determination of whether the officer's conduct violated a clearly established right.

B. THE ABSENCE OF GUIDANCE ON THE ROLE OF DISTRICT COURT OPINIONS IN THE PROCESS OF DETERMINING WHETHER A POINT OF LAW IS CLEARLY ESTABLISHED FOR PURPOSES OF QUALIFIED IMMUNITY HAS LEAD TO FRACTURED OPINIONS AMONG THE COURTS OF APPEAL

In the absence of specific guidance from the United States Supreme Court on the role of district court opinions in determining whether a point of law is clearly established, the circuits have attempted to fashion their own rules based upon what they believe the Supreme Court would do. The results have been anything but uniform.

The Fourth, Tenth and Eleventh Circuits appear to accord the least weight to district court opinions. In these circuits, district court opinions are not considered at all in determining whether an issue is clearly decided. See, e.g., Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 594 (10th Cir. 1999) (considering only Supreme Court, forum circuit, highest state court, or clearly established weight of authority from other circuit courts); Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999) (considering only Supreme Court, forum circuit and highest state court); Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 826 n. 4 (11th Cir.), cert. denied, Jenkins ex rel. Hall v. Herring, 522 U.S. 966, 118 S. Ct. 412, 139 L. Ed. 2d 315 (1997)(same).

The Second, Third, and Seventh Circuits use district court opinions in determining whether a particular point of law is clearly established, but the district court opinions are not dispositive on the issue. Doe v. Delie, 257 F.3d 309, 321 n.10 (3d Cir. 2001) ("We have held that district court decisions do not establish the law of the circuit, and are not even binding on other district courts within the district. Yet, as our prior decisions have illustrated, district court opinions do play a role in the qualified immunity analysis."), Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("[District court opinions] are evidence of the state of the law. Taken together with other evidence, they might show that the law had been clearly established. But by themselves they cannot clearly establish the law because, while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and

therefore do not establish the duties of nonparties."); Jermosen v. Smith, 945 F.2d 547, 551 (2d Cir. 1991) ("We note, however, that because this decision was rendered in the Southern District of New York, it could not, by itself, clearly establish a principle of law in the Western District of New York where Attica is situated.... Thus, it seems that the state of the law...was unclear at the time Lippold and the other defendants acted.").

The Sixth, Eighth, and Ninth Circuits fall at the opposite end of the spectrum from the Fourth, Tenth and Eleventh circuits. These circuits allow a district court to determine that a right is clearly established based upon the district court's own precedent. Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) ("Our review of the Supreme Court's decisions and of our own precedent leads us to conclude that, in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself."); Hayes v. Long, 72 F.3d 70, 73-74 (8th Cir.1995) ("[I]n the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits and district courts....") (quoting Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1988), cert. denied, 490 U.S. 1075, 109 S. Ct. 2087, 104 L. Ed. 2d 650 (1989)).

Moreover, even panels and judges within the various circuits use conflicting approaches in analyzing how reasonable decisions of federal district court judges affect the qualified immunity

analysis. Thus, while in the instant case, a Fourth Circuit panel ignored the fact that a federal District Court Judge found no constitutional violation, another Fourth Circuit panel (in an opinion issued less than a month before the panel opinion in the instant case) held that a public officer was entitled to qualified immunity because the District Court Judge had found no constitutional violation, even though the panel disagreed with the District Court Judge on that point. See Doe v. Johnson, 597 F.3d 163, 176 (4th Cir. 2010) ("[w]hile we disagree with the district court's interpretation [of the law], we do not view the interpretation to be unreasonable"). See also, e.g., Shotland v. City of Torrance, 189 Fed. Appx. 615 (9th Cir. 2006) (Bybee, J., dissenting) ("But the very fact that this question could reasonably have been resolved in either of these two ways means that, almost by definition, "it would [not] be clear to a reasonable officer that his conduct was unlawful," and the defendants are therefore entitled to qualified immunity."); Gable v. Lewis, 201 F.3d 769, 773 (6th Cir. 2000) (Nelson, J., dissenting) ("The underlying issue in the case at bar ... is one on which there has heretofore been no controlling Supreme Court or Sixth Circuit authority and as to which federal judges of reasonable competence could disagree and in fact have disagreed. Because I do not think we ought to require Highway Patrol officers to be more prescient than Article III judges when it comes to divining future developments in the law, I would recognize the defendants' right to qualified immunity here."); Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1149-52 (11th Cir. 1994) ("We cannot realistically expect that reasonable police officers know more than reasonable judges about the law.");

Swanson v. Powers, 937 F.2d 965, 968 (4th Cir.1991) ("Since qualified immunity is appropriate if reasonable officers could disagree on the relevant issue, it surely must be appropriate when reasonable jurists can do so."), cert. denied, 502 U.S. 1031, 112 S. Ct. 871, 116 L. Ed. 2d 777 (1992); Bumgarner v. Hart, 316 Fed. Appx. 201, 2009 WL 567227 (3d Cir. 2009) (holding that officers were entitled to qualified immunity where one federal District Court Judge concluded the officers' actions were constitutional, reasoning that "when reasonable jurists arrive at differing conclusions as to the lawfulness of an officer's conduct, it is difficult to say that the conduct in question violated clearly established law"). See also Davis v. Scherer, 468 U.S. 183, 196 n. 13, 104 S. Ct. 3012 at 3020 n.13, 82 L. Ed. 2d 139 (1984) ("unfair and impracticable" to hold public officials to the same level of knowledge as trained lawyers).

Obviously, these varied approaches to determining when a district court opinion can be used to determine that a right is clearly established lead to disparate treatment by Courts of Appeal, and conflicting results. For example, in Tenenbaum v. Williams, 193 F.3d 581, 605 (2d Cir. 1999), the Second Circuit held that

> it is particularly difficult to conclude that the individual defendants' behavior was wrongful under "clearly established" Fourth amendment principles in light of the district court's carefully considered decision that it did not violate the Fourth amendment at

> all, even though we ultimately disagree with that conclusion.

Id. at 605. The Second Circuit's opinion is in stark contrast to the Fourth Circuit panel opinion in this case where the district court issued a carefully considered decision that Officer Hudson's conduct did not violate the Constitution, but the Fourth Circuit panel not only disagreed with that conclusion, but found (without addressing or discussing the District Court Judge's analysis) that the law was "clearly established." The Court should grant certiorari to resolve this split among the circuits and provide a uniform rule for the role of district court opinions in the qualified immunity analysis.

The practical result of the Fourth Circuit panel opinion's decision in the instant case is that law enforcement officers in the Fourth Circuit will no longer be judged on whether a reasonable officer would have viewed his actions as violating clearly established law, but instead they will be judged on whether a court of appeals panel will view their actions as violating the Constitution. Given the unpredictable, rapidly-changing, and often dangerous circumstances that confront law enforcement officers, expecting these officers "to predict the future course of constitutional law," Procunier v. Navarette, 434 U.S. 555, 562, 98 S. Ct. 855, 55 L. Ed. 2d 24 (1978), before they act could have disastrous results.

The issue of whether a disagreement among reasonable judges indicates that an issue is not

clearly established has confounded a number of Court of Appeals, Court of Appeals panels, and judges. The lack of clarity on this issue among the lower courts means that the strength of a defendant's qualified immunity defense will depend on where a case was filed. Given the importance of the defense of qualified immunity to government officials, the federal courts should speak with one voice on this issue. A grant of certiorari would provide the court with a vehicle to address the Fourth Circuit panel's improper denial of qualified immunity and to resolve the uncertainty between the circuits on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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[ENTERED: APRIL 1, 2010]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1644

HILARIE G. SCARBRO, Administratrix of the Estate of Gary Eugene Rummer,

Plaintiff – Appellant,

v.

NEW HANOVER COUNTY; NEW HANOVER COUNTY SHERIFF'S DEPARTMENT; NEW HANOVER COUNTY JAIL; SIDNEY A. CAUSEY, Individually and in his capacity as Sheriff of New Hanover County; J.T. LEONARD, Individually and in his official capacity as detective of the New Hanover County Sheriff's Department; E. MORTON, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; B.R. HUDSON, Individually and in his official capacity as deputy of the New Hanover Sheriff's Department; T.L. FUSS, Individually and in his official capacity as corporal of the New Hanover County Sheriff's Department; D.E. KEYES, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; MR. HANSEN,

Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; J.P. HATCH, Individually and in his official capacity as sergeant of the New Hanover County Sheriff's Department; M. GRIMES, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; MR. WARD, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; S. JONES, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; W. THOMAS PARKER, Individually and in his official capacity as chief deputy of the New Hanover County Sheriff's Department; CLARENCE A. HAYES, Individually and in his official capacity as captain of the New Hanover Sheriff's Department; ANGELA GOEBEL, Deputy, Individually and/or in her official capacity; DENNIS KUTROW, Deputy, Individually and/or in his official capacity; DEPUTY DRAKOW, Deputy Sheriff, individually and in his official capacity; DEPUTY FRINK, Deputy Sheriff, individually and in his official capacity,

Defendants – Appellees,

and

SUSAN BARFIELD, R. N., Individually and in her official capacity; GAYSHERON BELL, Deputy, Individually and in her official capacity as an employee of the New Hanover County Health Department; NEW HANOVER COUNTY HEALTH DEPARTMENT; JANET MCCUMBIE, Individually and in her official capacity as Personal Health Director of the New Hanover County Health

Department; PENNY RAYNER, FNP, Individually and in her official capacity; DAVID RICE, Individually and in his official capacity as Health Director of the New Hanover County Health Department,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Louise W. Flanagan, Chief District Judge. (7:03-cv-00244-FL)

Argued: December 1, 2009

Decided: April 1, 2010

Before KING and SHEDD, Circuit Judges, and John Preston BAILEY, Chief United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by unpublished opinion. Judge Shedd wrote the opinion, in which Judge King and Judge Bailey joined.

John Dwight Hudson, HUDSON & GENTRY, LLC, Myrtle Beach, South Carolina, for Appellant. James R. Morgan, Jr., WOMBLE, CARLYLE, SANDRIDGE

& RICE, PLLC, Winston-Salem, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

SHEDD, Circuit Judge:

Hilarie G. Scarbro, Administratrix of the Estate of Gary Eugene Rummer, appeals the judgment entered in favor of the defendants on her claims under 42 U.S.C. § 1983 for excessive force, inadequate medical care, and conspiracy to deprive Rummer of his constitutional rights. For the following reasons, we affirm in part, but we reverse the district court's order granting summary judgment in favor of Defendant Deputy Billy Ray Hudson on the inadequate medical care claim, and we remand for further proceedings consistent with this opinion.

I.

A.

In reviewing the district court's order granting summary judgment to the defendants, we view the facts in the light most favorable to the plaintiff. Scott v. Harris, 550 U.S. 372, 378 (2007). Gary Eugene Rummer was arrested and incarcerated for failure to serve the community service portion of his sentence for driving under the influence of alcohol. A few days after he was incarcerated, Rummer began having delusions and summoned a guard. After learning of

Rummer's alcohol addiction, the guard determined that Rummer was suffering from delirium tremens ("DTs") caused by alcohol withdrawal and moved him to a safekeeping cell for inmates who have medical or mental health issues or who are disruptive. Later that morning, Rummer was taken to the medical unit where Nurse Barfield examined him and treated him for DTs. Rummer was alert, oriented, and walking on his own.

Upon his return to the crowded safekeeping cell, Rummer was stumbling over the other inmates' mats and bothering them. When the other inmates complained, Deputy Billy Ray Hudson was ordered to move Rummer to a padded cell. Officer Melody Grimes accompanied Hudson and guarded the door to the safekeeping cell.

Hudson entered the room in a "bum rush." He approached Rummer and grabbed Rummer's arm to handcuff him, but Rummer did not cooperate. At that point, Hudson took him to the concrete floor head-first from a standing position. Other inmates recalled Rummer's head hitting the floor with a thud and then hearing Rummer give a "horrific" scream.

After the takedown, Rummer was bleeding from a scratch above his eye. Because Rummer could not walk on his own, the guards carried him to a padded cell where he laid moaning on the cell floor. A supervising officer then decided to call the medical unit, and after the medical staff refused to come to the cell, Hudson and two other officers lifted Rummer into a wheelchair and transported him to the medical unit.

Rummer's condition had drastically changed since Nurse Barfield first treated him for DTs hours earlier. He was no longer lucid or talking coherently, his glasses were broken, and he had urinated on himself. When Nurse Barfield asked Hudson if Rummer had fallen, Hudson responded, "No, he did not fall," and failed to inform her of the takedown events. Unaware of Rummer's head injury, Nurse Barfield prescribed medication for DTs and recommended that Rummer be transferred to Central Prison, a larger facility where he could be monitored more closely.

Rummer was likely unconscious when he was transported to Central Prison. When Central Prison staff observed Rummer's condition, they immediately sent him to Wake Medical Center. There, Rummer's CAT scan revealed a large acute subdural hematoma. Rummer was pronounced dead after an unsuccessful operation. According to Rummer's physician, the most important factor in treating this type of injury is the amount of time it takes for the injured person to receive treatment.

An autopsy revealed that Rummer died from blunt force head trauma and that he had also recently sustained a neck fracture and a bruised right eyebrow. His injuries and rapid deterioration are consistent with his being thrown to the ground from a standing position and hitting his head.

B.

After Rummer's death, Scarbro filed an action against various members of the New Hanover

County Sheriff's Department and the New Hanover County Health Department asserting claims of excessive force, inadequate medical care, conspiracy, and supervisor liability pursuant to 42 U.S.C. § 1983, and supplemental state law claims of medical negligence and wrongful death.[1] The district court dismissed Scarbro's claims against most of the defendants[2] and eventually granted summary judgment in favor of the remaining defendants, including Hudson.

II.

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's order granting summary judgment de novo. Jennings v. Univ. of North Carolina, 482 F.3d 686, 694 (4th Cir. 2007) (en banc).[3]

[1] Scarbro later filed another complaint that alleged essentially identical claims against different parties. These cases were thereafter consolidated.

[2] Scarbro subsequently filed a stipulation of dismissal as to her claims against other Health Department defendants.

[3] Scarbro raises five issues on appeal, but only two merit discussion. The plaintiff's remaining arguments on appeal are without merit. As to those issues, we affirm substantially on the reasoning of the district court. Scarbro v. New Hanover County, No. 7:03-CV-244-FL(1) (E.D.N.C. May 8, 2008).

A.

First, Scarbro argues that the district court erred in granting Hudson summary judgment on the excessive force claim. A pretrial detainee's claim of excessive force is governed by the Due Process Clause of the Fourteenth Amendment. Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008). To succeed on such a claim, the plaintiff must demonstrate that the defendant "inflicted unnecessary and wanton pain and suffering" upon the detainee. Whitley v. Albers, 475 U.S. 312, 320 (1986); Iko v. Shreve, 535 F.3d 225, 239 (4th Cir. 2008). This determination turns on whether the force was applied "in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley, 475 U.S. at 320-21 (internal quotation marks omitted); Wilkins v. Gaddy, ___ U.S. ___, 130 S.Ct. 1175 (2010) (describing this as the "core judicial inquiry"). Moreover, we must accord due deference to an officer's efforts to restrain a detainee when faced with a dynamic and potentially violent situation; otherwise, "we would give encouragement to insubordination in an environment which is already volatile enough." Grayson v. Peed, 195 F.3d 692, 697 (4th Cir. 1999).

To the extent that there are differences in the witnesses' testimony regarding how the takedown occurred, there is no evidence suggesting that Hudson applied force in a malicious, wanton, or sadistic manner. When Hudson grabbed Rummer's arm to handcuff him, Rummer did not cooperate; Hudson then took Rummer to the floor, which was

covered by mats, and handcuffed him. During the takedown, the mats covering the floor apparently shifted, allowing Rummer's head to hit the concrete floor. However, this is not evidence that Hudson's purpose was malicious, sadistic or wanton. Therefore, we find that the evidence fails to establish that Hudson used excessive force in subduing Rummer. Accordingly, we affirm the district court's order granting summary judgment to Hudson as to Scarbro's claim of excessive force.

B.

Scarbro also argues that the district court erred in granting Hudson summary judgment as to her inadequate medical care claim. She challenges the district court's finding that there is no genuine issue of material fact as to whether Hudson subjectively knew of Rummer's serious medical need.[4]

Scarbro bears the burden of establishing that Hudson's conduct constituted a constitutional violation. Henry v. Purnell, 501 F.3d 374, 377 n.2 (4th Cir. 2007). The rights of a pretrial detainee complaining of inadequate medical care under the Fourteenth Amendment "are at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983). To prevail on a claim of inadequate medical care, Scarbro must

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[4] The district court also stated that Hudson is entitled to qualified immunity but, because it found no constitutional violation, it did not fully analyze Hudson's claim of qualified immunity.

produce evidence of acts or omissions sufficiently harmful to constitute deliberate indifference to the inmate's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

First, Scarbro must show that the injury was objectively serious. Farmer v. Brennan, 511 U.S. 825, 834 (1994). Then, she must show that Hudson subjectively knew of Rummer's serious medical need. Id. at 834-35. A factfinder may infer that a prison official knew of a substantial risk of harm from the fact that the risk was obvious, id. at 842, or from the fact that the inmate's need for medical attention was "'so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" Iko, 535 F.3d at 241 (citation omitted). Finally, Scarbro must show that Hudson acted with deliberate indifference to Rummer's serious medical need. Farmer, 511 U.S. at 835. An officer can be held liable for deliberate indifference only where "the official knows of and disregards an excessive risk to inmate health or safety." Id. at 837; see Parrish ex rel. Lee v. Cleveland, 372 F.3d 294, 303 (4th Cir. 2004) (citation omitted) ("[T]he evidence must show that the official in question subjectively recognized that his actions were 'inappropriate in light of that risk.'").

Turning to the facts at hand, we must first decide whether Rummer suffered from an objectively serious medical condition. Viewed in the light most favorable to Scarbro, Rummer hit the concrete floor head-first, screamed out in excruciating pain, and was bleeding above his eye. Rummer's glasses were broken, he had urinated on himself, he was unable to speak coherently, and he was unable to walk. In

view of this evidence, it is clear that Rummer had an objectively serious medical need after the takedown.

We now consider whether Hudson subjectively recognized Rummer's serious medical need. After taking Rummer to the floor, Hudson observed that Rummer's condition had seriously deteriorated. Because the substantial risk of harm to Rummer was so obvious, a jury could infer that Hudson knew that Rummer had a serious medical need. See Farmer, 511 U.S. at 842. Therefore, the district court erred in finding that Scarbro failed to provide sufficient evidence to show that Hudson knew that Rummer was at serious risk of head injury.

Finally, we turn to whether Hudson acted with deliberate indifference toward Rummer's serious medical need. Nurse Barfield specifically asked Hudson if Rummer had fallen, and Hudson told her that he had not. Further, Hudson did not inform her how Rummer sustained his injuries or that he had used force against Rummer. Nurse Barfield's question should have alerted Hudson to the importance of her knowing whether Rummer sustained any physical impact, whether or not his fall was caused by use of force. Nurse Barfield explained that if she had known about the takedown, she would have treated Rummer for a head injury (rather than for DTs) and immediately sent him to the Emergency Room. Evidence of Hudson's misrepresentation of critical medical information requested by medical personnel is sufficient to raise a reasonable inference that he recognized that his response was inappropriate in light of Rummer's serious medical need. See Parrish ex rel. Lee, 372

F.3d at 303. Therefore, we conclude that Scarbro provided sufficient evidence to raise a genuine issue of material fact as to whether Hudson was deliberately indifferent to Rummer's serious medical need.

Having determined that there is sufficient evidence of a constitutional violation as to the inadequate medical care claim, we must now consider whether Hudson is entitled to qualified immunity. See Pearson v. Callahan, 555 U.S. ____, 129 S.Ct. 808, 815-16 (2009). Qualified immunity is resolved using a two-prong analysis: whether the plaintiff provided sufficient facts to make out a constitutional violation and whether the right at issue was clearly established at the time of the alleged violation. Id. Having found that Scarbro has met her burden as to the first prong, we must now determine whether Hudson's alleged misconduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Hudson bears the burden proving that the right at issue here was not clearly established. Henry, 501 F.3d at 378.

A right is clearly established where it has been specifically identified so "as to leave no doubt that the challenged action was unconstitutional." Swanson v. Powers, 937 F.2d 965, 969 (4th Cir. 1991). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Hope v. Pelzer, 536 U.S. 730, 739 (2002) (internal quotation marks omitted). Thus, in determining whether a right was clearly established, the key issue is "whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 194-95.

We have denied qualified immunity to an officer who transferred custody of a detainee to another officer without informing the officer that the detainee was suicidal. See Gordon, 971 F.2d at 1096-97. The misconduct in the instant case is even more egregious than that in Gordon because Hudson misrepresented critical medical information that was specifically asked for by medical personnel, and a reasonable inference from this inquiry is that the requested information was necessary to properly treat Rummer's injuries. Unlike Gordon, where the officer failed to offer information, Hudson affirmatively misrepresented relevant medical information. No reasonable officer could have believed, in light of clearly established law, that such a misrepresentation was lawful under these circumstances. Therefore, Hudson is not entitled to qualified immunity.

III.

For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

[ENTERED: APRIL 1, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1644
(7:03-cv-00244-FL)

HILARIE G. SCARBRO, Administratrix of the Estate of Gary Eugene Rummer,

Plaintiff – Appellant

v.

NEW HANOVER COUNTY; NEW HANOVER COUNTY SHERIFF'S DEPARTMENT; NEW HANOVER COUNTY JAIL; SIDNEY A. CAUSEY, Individually and in his capacity as Sheriff of New Hanover County; J.T. LEONARD, Individually and in his official capacity as detective of the New Hanover County Sheriff's Department; E. MORTON, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; B.R. HUDSON, Individually and in his official capacity as deputy of the New Hanover Sheriff's Department; T.L. FUSS, Individually and in his official capacity as corporal of the New Hanover County Sheriff's Department; D.E. KEYES, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; MR. HANSEN, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; J.P.

HATCH, Individually and in his official capacity as sergeant of the New Hanover County Sheriff's Department; M. GRIMES, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; MR. WARD, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; S. JONES, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; W. THOMAS PARKER, Individually and in his official capacity as chief deputy of the New Hanover County Sheriff's Department; CLARENCE A. HAYES, Individually and in his official capacity as captain of the New Hanover Sheriff's Department; ANGELA GOEBEL, Deputy, Individually and/or in her official capacity; DENNIS KUTROW, Deputy, Individually and/or in his official capacity; DEPUTY DRAKOW, Deputy Sheriff, individually an in his official capacity; DEPUTY FRINK, Deputy Sheriff, individually and in his official capacity,

Defendants – Appellees

and

SUSAN BARFIELD, R. N., Individually and in her official capacity; GAYSHERON BELL, Deputy, Individually and in her official capacity as an employee of the New Hanover County Health Department; NEW HANOVER COUNTY HEALTH DEPARTMENT; JANET MCCUMBIE, Individually and in her official capacity as Personal Health Director of the New Hanover County Health Department; PENNY RAYNER, FNP, Individually an in her official capacity; DAVID RICE,

Individually and in his official capacity as Health Director of the New Hanover County Health Department,

Defendants

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed in part and reversed in part. This case is remanded to the District Court for further proceedings consistent with the Court's decision.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: MAY 8, 2008]

UNITED STATES DISTRICT COURT
Eastern District of North Carolina
SOUTHERN DIVISION

HILARIE G. SCARBRO, Administratrix of the Estate of Gary Eugene Rummer,
Plaintiff,

v. ***Judgment in a Civil Case***
Case Number: 7:03-CV-244-FL

NEW HANOVER COUNTY, et al.,
Defendants.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment is GRANTED as to plaintiff's remaining claims. The remaining motions of or relating to trial issues, are DENIED as MOOT, where the Clerk of Court is directed to discontinue the case from the trial docket and now to CLOSE the case.

SO ORDERED: /s/Louise W. Flanagan, Chief United States District Judge.

JUDGMENT FILED AND ENTERED THIS 8th DAY OF MAY 2008 AND COPIES SERVED ELECTRONICALLY ON COUNSEL.

May 8, 2008

DENNIS P. IAVARONE, CLERK

/s/Donna Rudd
(by) Deputy Clerk

[ENTERED: APRIL 27, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1644
(7:03-cv-00244-FL)

HILARIE G. SCARBRO, Administratrix of the Estate of Gary Eugene Rummer

Plaintiff – Appellant

v.

NEW HANOVER COUNTY; NEW HANOVER COUNTY SHERIFF'S DEPARTMENT; NEW HANOVER COUNTY JAIL; SIDNEY A. CAUSEY, Individually and in his capacity as Sheriff of New Hanover County; J.T. LEONARD, Individually and in his official capacity as detective of the New Hanover County Sheriff's Department; E. MORTON, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; B.R. HUDSON, Individually and in his official capacity as deputy of the New Hanover Sheriff's Department; T.L. FUSS, Individually and in his official capacity as corporal of the New Hanover County Sheriff's Department; D.E. KEYES, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; MR. HANSEN, Individually and in his official capacity as deputy of the New Hanover County Sheriff's Department; J.P.

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Defendants – Appellees

and

SUSAN BARFIELD, R. N., Individually and in her official capacity; GAYSHERON BELL, Deputy, Individually and on her official capacity as an employee of the New Hanover County Health Department; NEW HANOVER COUNTY HEALTH DEPARTMENT; JANET MCCUMBIE, Individually and in her official capacity as Personal Health Director of the New Hanover County Health Department; PENNY RAYNER, FNP, Individually

and in her official capacity; DAVID RICE, Individually and in his official capacity as Health Director of the New Hanover County Health Department

Defendants

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Shedd, and Chief District Judge Bailey.

For the Court

/s/ Patricia S. Connor, Clerk

[ENTERED: MAY 8, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
SOUTHERN DIVISION

No. 7:03-CV-244 FL(1)

HILARIE G. SCARBRO, Administratrix of the Estate of Gary Eugene Rummer	)
Plaintiff,	)
v.	)
NEW HANOVER COUNTY, et al.,	)
Defendants.	)

ORDER

This matter comes before the court upon defendants' motion for summary judgment on remaining claims in the action (DE # 91), to which plaintiff responded February 1,2008, and defendants have replied. In this posture, where trial is set to commence May 19, 2008, the issues raised on motion are ripe for decision. For the reasons stated below, defendants' motion for summary judgment is granted, and the case dismissed.

STATEMENT OF THE CASE

Plaintiff, as administratrix of the estate of decedent Gary Eugene Rummer ("Rummer"), filed

the instant action December 23, 2003, raising claims of or relating to Rummer's alleged physical abuse and inadequate medical treatment while a detainee at the New Hanover County Jail on or about January 14.2003. and his subsequent death January 16, 2003. (Compl. ¶¶ 2, 20, 26-27, 32). Plaintiff complains of federal civil rights violations pursuant to 42 U.S.C. § 1983 ("§ 1983"), and medical malpractice and wrongful death under North Carolina state law. (Id. at ¶¶ 33-70).

The procedural history of the case is a lengthy one. In order entered May 5, 2004, the court addressed several motions to dismiss, and dismissed all claims against defendants New Hanover County, New Hanover County Sheriff's Department, and New Hanover County Jail, in addition to plaintiffs conspiracy claims, redundant official capacity claims, and plaintiff's claims for punitive damages against defendant New Hanover County Health Department and certain individual defendants in their official capacities. The related case was consolidated by order entered June 14, 2005.[1]

In order entered July 11,2006. the court granted in part motions for summary judgment filed by New Hanover County Health Department, and New Hanover County Sheriffs Department, and dismissed numerous individual defendants. Later, stipulation of dismissal was entered as to certain other individual defendants.

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[1] The court granted joint motion to consolidate filed by the parties May 17,2005 (DE # 37). wherein the parties noted that both lawsuits were brought by the same plaintiff, and both lawsuits involved identical issues of fact.

Remaining defendants, Sidney A. Causey, individually and in his capacity as Sheriff of New Hanover County ("Causey"), B.R. Hudson, a Deputy of the New Hanover County Sheriffs Department ("Hudson"), W. Thomas Parker, Chief Deputy of the New Hanover County Sheriffs Department ("Parker"), and Clarence A. Hayes, Captain of the New Hanover County Sheriffs Department ("Hayes"), filed the instant motion for summary judgment January 2, 2008, seeking dismissal of plaintiff's remaining claims. These claims include: (1) plaintiffs first cause of action against defendant Hudson for excessive force in violation of § 1983; (2) plaintiffs second cause of action against defendants Causey, Parker, and Hayes for adopting and executing policies which caused the use of excessive force in violation of § 1983; (3) plaintiffs third cause of action against defendant Hudson for inadequate medical care under § 1983; (4) plaintiffs fourth cause of action against defendants Causey, Parker, and Hayes for adopting and executing policies which led to inadequate medical care in violation of § 1983; and (5) plaintiff's eighth cause of action, a supplemental state law claim of wrongful death against Hudson, Causey, Parker, and Hayes. In the instant motion, supported by affidavits and depositions, these defendants argue entitlement to summary judgment on the basis of qualified immunity, and that plaintiff's claims fail as a matter of law.

STATEMENT OF THE FACTS

Upon arrest and detention by Carolina Beach Police in the late evening hours of January 9, 2003,

pursuant to an order for arrest for failure to appear for driving under the influence, Rummer was transported to the New Hanover County Jail where he arrived at or around I:30 a.m., January 10,2003. (Compl. ¶¶ 18-19; Def's Mem. Supp. Mot. For Summ. J., Ex. A). On January 14, 2003, during a safety check at or about 4:30 a.m., Deputy Mitchell Marlow ("Marlow") heard a knocking on the door of cell 2-0, where Rummer was being held. (Marlow Aff. ¶ 2). When Marlow responded to the knock, Rummer told him that he was addicted to alcohol, and that he had been kidnaped by a federal housing agency and put to work as a painter. (Id. at ¶ 3). Marlow informed his sergeant that Rummer appeared to be suffering from "the DTs" *[delirium tremens],* a symptom of alcohol withdrawal, prompting the sergeant to direct Marlow to arrange for Rummer's transfer to a safekeeping cell. (Id. at ¶¶ 2-4).

Shortly thereafter, Rummer was transferred to cell 423 by Deputy Kelly Vernon ("Vernon"). (Id. at ¶ 5). Cell 423 is a safekeeping cell which, instead of having bunks, has one mat on the floor of the cell for each inmate being held in the cell. (Hudson Dep. pp. 25-27).

At approximately 7:00 a.m., Rummer was taken for purposes of medical examination to Susan Barfield ("Barfield"), a nurse, who noticed slight tremors about his person, and prescribed Vistaril to treat what she perceived to be symptoms of alcohol withdrawal. (Barfield Dep. pp. 21, 49-50). Rummer was returned to cell 423, where he continued to exhibit unusual behavior. (Cline Dep. pp. 18,64;

Mikol Dep. pp. 13-14, 26, 29)[2] Other inmates in cell 423 began yelling to guards, asking them to remove Rummer, fearing that his behavior was going to result either in injury to himself or injury to somebody else. (Goebel Dep. p. 9; Cline Dep. pp. 64-65; Mikol Dep. p. 31). Goebel reported the situation to her supervisor, Sergeant Frederick Hatch ("Hatch"). (Goebel Dep. p. II).

Following an order from Hatch to assess the situation, defendant Hudson approached cell 423 and observed Rummer pulling on another inmate's sheet, mumbling to himself, standing overtop of another inmate, and taking items from other inmates. (Hudson Dep. pp. 14,28). Defendant Hudson reported these observations to Hatch, who directed defendant Hudson to transfer Rummer from cell 423 to cell 419 for safety purposes. (Id. pp. 40-42). Hatch noted that "the information in the computer was that [Rummer] drank alcohol and may possibly be suffering from the DT's." (Hatch Dep. Ex. 1). Officer Melody Grimes ("Grimes") testified that "they said he was going through DT's and that he was possibly bumping his head on the wall." (Grimes Dep. p. 31). Cell 419 is a padded cell wherein prisoners who are suicidal or violent are placed for their own safety. (Hudson Dep. p. 41).

Defendant Hudson entered cell 423 by himself while Grimes stood watch by the door. (Id. pp. 42-

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[2] Timothy Cline ("Cline") was an inmate at New Hanover County Jail on January 14,2003, and was in cell 423 with Rummer. (Cline Dep. p. 10). Sean Mikol ("Mikol") was an inmate at the New Hanover County Jail on January 14,2003, and shared a cell with Rummer. (Mikol Dep. pp. 6-7).

43). Defendant Hudson testified that he ordered Rummerto come out ofthe cell three times, and received no response. (Id. p. 48). This account is corroborated by Grimes, who testified that she heard defendant Hudson tell Rummer that he was being moved to a different cell (Grimes Dep. p. 10), and by inmate Mikol, who testified that he heard defendant Hudson ask Rummer to get up and come with him, then advise Rummer that he was going to be moved to a different cell. (Mikol Dep. pp. 36-37, 77). Inmate Cline testified that he did not recall hearing defendant Hudson say anything to Rummer before defendant Hudson took Rummer down. (Cline Dep. p. 24).

Defendant Hudson testified that, after Rummer failed to respond to his verbal commands, he touched Rummer on the right arm and said "Mr. Rummer, you need to come with me," at which time Rummer jerked away from him. (Hudson Dep. at 49). Defendant Hudson then grasped Rummer's right arm with his right hand. and pushing Rummer downward with his left hand, forced him towards the floor. (Id.) Rummer, who had been seated on a bench, came into contact either with the concrete floor ofthe cell, mats which were covering the concrete, or both. (Id. at 48-50, 57, 62; Cline Dep. p. 24). Defendant Hudson testified that Rummer caught himself with his left arm and wound up prone on the mat with his left arm under him. and that Hansen arrived and helped secure the handcuff on the left arm. (Hudson Dep. p. 58). Defendant Hudson testified that he forced Rummer to the floor rather than asking him to stand up because "if he stand up, that could be

more of a threat to me than actually putting him on the –across the mats on the floor." (Id. at 52).

When Rummer resisted being handcuffed. Grimes called for backup. (Hansen Aff. ¶¶ 3, 5; Grimes Dep. pp. 10, 21-22). Hatch and Officer Hugo Hansen ("Hansen") responded to assist. (Hansen Aff. ¶ 5; Hudson Dep. p. 80). Hansen remembers helping defendant Hudson handcuff Rummer, but Hatch believed that Rummer had already been cuffed upon their arrival. (Hansen Aff. ¶ 5; Hatch Dep. Ex. 1). Rummer was removed from cell 423 immediately, and taken to ce11419 by Hansen and Hatch. (Grimes Dep. p. 11: Hansen Aff. ¶ 6; Hudson Dep. p. 80).

Rummer was partially walking and partially being carried during this period oftransportation from cell 423 to cell 419. (Hansen Aff. ¶ 7; Grimes Dep. p. 31). Defendant Hudson had torn the rubber gloves that he was wearing, and stayed behind in cell 423. (Hudson Dep. p. 81). On the way to cell 419, Rummer was mumbling and told Hansen that he "want[ed] to go home." (Hansen Aff. ¶ 8). When Rummer arrived at cell 419, Hatch was behind Rummer, holding his armpits. (Id. at ¶ 10). There was at that time another inmate lying on the floor in cell 419, and as Rummer stepped into cell 419, he tripped over the second inmate and fell to the floor, striking his chest and right shoulder. (Id.) Hatch sought to catch Rummer but was unsuccessful. and Rummer fell to the padded floor. (Id.)

When defendant Hudson caught up with the others and arrived at ce11 419, Rummer was on the floor of the cell, curled in a fetal position, and being

attended to by Deputy Keyes. (HudsonDep. p.85). Defendant Hudson testified that there was some blood on the mats that covered the floor of the cell, and that Keyes then noticed that there was a scratch or cut above Rummer's right eye. (Id.) Rummer was conscious at that time. (Id.) There is no evidence before the court suggesting that defendant Hudson was aware of how Rummer came to be on the floor in cell 419.

Hatch ordered Rummer evaluated by medical staff. (Hatch Dep. 39; Hansen Aff. ¶ 10). Defendant Hudson, who was retrieving new rubber gloves from the control room of the New Hanover County Jail. was not present when the medical department was contacted. (Hudson Dep. p. 143). Defendant Hudson, Hansen, and Ward transported Rummer by wheelchair from cell 419, to the jail's medical department. (Hansen Aff. ¶ 111; Hudson Dep. pp. 94-96; Ward Aff. ¶ 6).

By all accounts the injury above Rummer's eye was relatively minor. Hatch noticed "a little scratch" that "was not bleeding." (Hatch Dep. p. 41). Hansen stated that he "did not even notice the scratch until Sergeant Hatch pointed it out." (Hansen Aff. ¶ 10). Defendant Hudson did not notice it until he arrived at cell 419. (Hudson Dep. p. 86). In her notes, Barfield described it as "three small scratches" and noted that the wound was not bleeding. (DE # 46-5 (Barfield Notes) p. 2). Defendant Hudson testified that, after cleaning the wound, Barfield said "it did not need any stitches, that it would be fine." (Hudson Dep. 105). Although the origins of the injury are not certain, Barfield's

notes show that defendant Hudson advised her that "he thought the scratches came from when [Rummer's] glasses became broken." (Hudson Dep. p. 80; DE # 46-5 (Barfield Notes) p. 2).

The record relied upon in support of and in opposition to the instant motion reveals the presence of five people in proximity to Rummer at time of his second examination, including two nurses, Barfield and Gaysheron Bell ("Bell"),[3] and three officers, Hansen, Ward, and defendant Hudson. It illuminates through the testimony of Barfield and defendant Hudson, and the affidavits of Hansen and Ward, a cursory examination of Rummer by medical staff, resulting in the administration of medications per protocol for symptoms of alcohol withdrawal. (Hudson Dep. p. 101, 105; Barfield Dep. p. 43; Hansen Aff. ¶ 12). Notes made by Barfield contemporaneous with the examination recite in part:

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[3] Reliance on Bell's testimony at deposition is limited to a single page ofthe transcript introduced by plaintiff relating to examination on medical protocol. Facts pertaining to Rummer's second presentation to the medical department are adduced by the parties through introduction of Barfield and defendant Hudson's testimony at deposition.

> There are three sm. scratches into and little beside right eyebrow. Cleansed [with water] but [no] blood noted on cotton ball and none on jumpsuit. Entire head [and] scalp area felt [and] checked for lumps, bumps, or skin breaks [and none] found. Asked attending deputy [defendant Hudson] if perhaps inmate had fallen recently [and] he stated he thought scratch came from when [patient's] glasses became broken.

(DE # 46-5 (Barfield Notes) p. 2).

Barfield testified that Rummer was "completely changed" from the first time that she had seen him. (Barfield Dep. p. 28). Rummer, now wearing a urine-saturated jumpsuit, kept trying to slide out ofhis wheelchair. (Id. at 25). Barfield checked Rummer's head and scalp area for lumps, bumps, or skin breaks, but found none. (Id. at 31). Barfield cleaned the cut above his eye. (Id.; DE # 46-5 (Barfield Notes) p. 2). Barfield testified at deposition that she did not ask whether Rummer "had struck his head in any way." (Barfield Dep. p. 29).

Specifically, Barfield testified that she performed neurological tests which consisted of checking Rummer's eyes with a flashlight to make sure they both reacted equally, and having Rummer pull on her hands "to make sure that he had both side strength instead of one side weakness," but that

she neglected to document these neurological tests in her notes. (Barfield Dep. pp. 28-29).

Barfield testified that, to the extent she performed any neurological tests on Rummer, such tests were secondary because she" was not looking for head injuries," given the lack of outward signs of head injury. (Id. at 29). She did not ask defendant Hudson what caused Rummer's glasses to break. (Id. at 30). Barfield also testified that what caused Rummer's glasses to break was not something that she needed to know. (Id.) Barfield gave Rummer Librium and Dilantin pills to treat what she perceived as symptoms of alcohol withdrawal, but did not summon a doctor to observe and assess Rummer. (Id. at p. 43; DE # 46-5 (Barfield Notes) p. 2).

Defendant Hudson testified that Barfield asked him whether Rummer had fallen, and he responded "[n]o, he did not fall." (Hudson Dep. p, 147). His observations concerning Rummer's efforts to avoid the wheelchair were consistent with that of Barfield, (Id. at 96; Barfield Dep.at 31). His recollection of the administration of medicine by her, while not as technical was consistent with and amplified upon that of Barfield. (Id. at 101; Barfield Dep. p. 43). Barfield did not, however, recall asking any question of the officer, including whether Rummer had fallen, though her notes report this inquiry and defendant Hudson testified to an exchange with the nurse initiated by her question whether Rummer had fallen. (Barfield Dep. p, 29-30; DE # 46-5 (Barfield Notes) p. 2).

Defendant Hudson did not recall telling Barfield that Rummer was scratched by glasses. (Id.) Barfield testified that she did not ask him about the cause of the scratches she observed, but her notes and testimony evidence her understanding that Rummer's glasses caused the scratches on his face. (Id.; DE # 46-5 (Barfield Notes) p. 2).

The affidavits of Ward and Hansen, who were also present at the physical examination, shed no light on any communication between defendant Hudson and Barfield regarding the possible source of Rummer's injuries, but are otherwise generally consistent with the testimonial accounts. Ward noted a scratch over Rummer's eye, described Rummer's attempts to get out of the wheelchair, and "recall[ed] Nurse Barfield giving pills to Mr. Rummer.'· (Ward Aff. ¶¶ 5, 6, 8). Barfield then instructed the deputies to take Rummer back to cell 419. (Id. at ¶ 9). Hansen stated that Barfield inspected Rummer' s eye, cleaned the scratch, "felt his head for bumps," gave him some "medication, which he ultimately swallowed," and "also took his vital signs." (Hansen Aff. ¶ 12). At this second examination, Barfield observed the other symptoms presented by Rummer as consistent with alcohol withdrawal. (Barfield Dep. pp. 42-43).

After the second examination by Barfield, Rummer was transported by wheelchair back to cell 419. (Ward Aff. ¶¶ 9, 10). When returned to his cell, Rummer stood up and walked around the cell, looking for a mat. (Id.) Ward obtained a mat for him and other deputies got fresh clothes for Rummer and changed his clothes. (Id. ¶¶ 11-12). Ward stated that

"Mr. Rummer did not complain of any injuries during any ofthis time. He was still standing when I left his cell." (Id. at ¶ 13). Barfield told Corporal Timothy Fuss ("Fuss") that Rummer needed to go to Central Prison Hospital so that he could be at "a bigger facility with more people to monitor him," and Fuss prepared a written request that Rummer be transferred. (Barfield Dep. p. 45-47; Fuss Aff. ¶ 2). Later, Officer Morton went to cell 419 to pick up Rummer (Morton Dep. p. 12), and observed that he "was breathing but appeared to be in a very deep sleep due to being heavily medicated by our medical staff." (Morton Dep. Ex. 1). Morton was unable to awaken Rummer, and requested that Fuss and defendant Hudson help him get Rummer into a wheelchair. (Id. at Ex. 2).

Fuss testified that prior to transport Rummer was:

> ... snoring and breathing. Nothing appeared out of the ordinary. I saw no reason to call the nursing staff or take him to the hospital. He appeared fine. I was aware that he had been placed on medication. It was not unusual to have inmates in a deep sleep after being medicated by the medical staff.

(Fuss Aff. ¶ 3). Defendant Sheriff of New Hanover County Causey testified to his observation that "[i]t is not unusual for inmates suffering from DTs to be medicated by the nursing staff and to then fall into a deep sleep." (Causey Aff. ¶ 7).

Rummer, who was snoring, appeared asleep so Morton placed a seat belt across his chest and hooked it to the cage so that Rummer would not fall over. (Morton Dep. Ex. 1). Morton and Rummer left New Hanover County Jail at or about 12:05 p.m., and arrived at Central Prison Hospital at or about 2:15 p.m. (Id.) Later that day, following an examination of Rummer, Central Prison Hospital notified New Hanover County Jail that Rummer was in a coma, and then later reported that he had died as a result of trauma to his head. (Fuss Aff. ¶ 6). An autopsy performed by Aaron M. Gleckman, M.D., January 17,2003, revealed that the cause of death was blunt head trauma on the right side of Rummer's head, and that Rummer had also suffered an anterior fracture of the fifth cerebral vertebra. (Gleckman Dep. Ex. 2).

DISCUSSION

A. Standard of Review

Under Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). The court tests for a "genuine issue" through recourse to the relevant law, "view[ing] the evidence presented through the prism of the substantive evidentiary burden." Id.

A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)).

In making a determination on a summary judgment motion, the court construes evidence in the light most favorable to the non-moving party and draws all reasonable inferences in the non-movant's favor. Anderson, 477 U.S. at 255; see also Odom v. S.C. Dep't of Corr., 349 F.3d 765, 774 (4th Cir. 2003) ("we are to view the evidence in a light most favorable to the nonmoving party and to give him the benefit of all reasonable inferences"). Nevertheless, judges are not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party." Id. at 251. Evidence considered by the court must be admissible, and "airy generalities, conclusory assertions and hearsay statements [do] not suffice to stave off summary judgment." United States v. Roane, 378 F.3d 382, 400-01 (4th Cir. 2004).

A court required to rule upon the issue of qualified immunity potentially engages in a two step inquiry. The court initially must determine whether "[t]aken in the light most favorable to the party asserting the injury ... the facts alleged show the officer's conduct violated a constitutional right." Saucier v. Katz, 533 U.S. 194, 201 (2001). If no constitutional violation can be established, the inquiry ends there and summary judgment based on immunity is valid. Id.

If, however, a constitutional violation is detected, the court must determine whether the right was clearly established at the time of the alleged violation. Id. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 202. The Supreme Court also warned in Saucier that denying summary judgment any time a material issue of fact remains upon consideration of the first step, if upon consideration of the second, and the law did not put the officer on notice that his conduct would be clearly unlawful, "could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Court held that "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." Id.

The Fourth Circuit has held that "in gray areas. where the law is unsettled or murky. qualified immunity affords protection to an officer who takes an action that is not clearly forbidden--even if the action is later deemed wrongful." Rogers v. Pendleton, 249 F.3d 279,286 (4th Cir. 2001). Even where an officer is mistaken with respect to the relevant law, "[i]f the officer's mistake as to what the law requires is reasonable ... the officer is entitled to the immunity defense." Saucier, 533 U.S. at 205. In making its determination, the court must avoid engaging in "impermissible 20/20 hindsight," even when faced with a tragic outcome. Grayson, 195 F.3d at 695; see also Belcher v. Oliver, 898 F.2d 32, 35 (4th Cir. 1990) ("Only an exercise in impermissible judicial hindsight could justify holding these officers responsible for [detainee's unforeseeable death by] suicide.").

B. Excessive Force Claim Under § 1983 Against Defendant Hudson

"[E]xcessive force claims of pretrial detainees are governed by the Due Process Clause of the Fourteenth Amendment." Riley v. Dorton, 115 F.3d 1159, 1166 (4th Cir. 1999) (en banc). To succeed on the claim of excessive force against defendant Hudson under the Fourteenth Amendment, plaintiff must demonstrate that defendant Hudson "inflicted unnecessary and wanton pain and suffering" against Rummer. Taylor v. McDuffie, 155 F.3d 479,483 (4th Cir. 1998)(quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)). The court must determine whether the force was applied "in a good faith effort to maintain

or restore discipline or maliciously and sadistically for the very purpose of causing harm." Id.

At a minimum, Rummer was agitating the other inmates in the cell, which prompted the other inmates to call to the guards and request that Rummer be extracted from the cell. (Goebel Dep. p. 9; Cline Dep. pp. 64-65; Mikol Dep. p. 31). It is undisputed that defendant Hudson was ordered to remove Rummer from cell 423, and that defendant Hudson entered the cell in order to undertake this task. (Hudson Dep. pp. 40-42). There is no genuine issue regarding the fact that defendant Hudson then proceeded to grasp one of Rummer's arm in an attempt to apply handcuffs, and upon being met with what was described by multiple parties as "jerking away" and other resistance, defendant Hudson took Rummer down to the floor.[4] (Mikol Dep. pp. 37-39; Hudson Dep. pp. 140, 160; Grimes Dep. pp. 10, 22).

It is undisputed that mats covered much of the floor of cell 423 at the time of the incident. (Cline Dep. p. 24). Defendant Hudson's undisputed testimony is that he directed Rummer down onto these mats. (Hudson Dep. p. 50). Grimes testified that once Rummer and defendant Hudson tumbled to the floor, Rummer was on one of the mats as defendant Hudson handcuffed him. (Grimes Dep. p. 11). Even if Rummer's head made contact with the concrete rather than the mats on the floor, there is

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[4] Inmate Cline, who was also present, never testified to any jerking away. When asked if Rummer resisted defendant Hudson in any way, he replied: "[w]ell, you know, its hard for me to say, you know. Someone could be tight with their arms and hold them tight and I wouldn't know." (Cline Dep. p. 28).

no evidence suggesting that this was defendant Hudson's intention, let alone that defendant Hudson used this force in a malicious, wanton, or sadistic manner.

Plaintiffs expert testified that defendant Hudson did not intend to hurt Rummer when he took him to the ground: "[h]e didn't purposefully cause the injuries. He purposefully took him to the ground but he didn't purposefully cause the injuries:' (Katsaris Dep. p. 261).

Prior to and during the incident defendant Hudson was concerned about his physical safety and about the possibility of the situation spiraling out of control if Rummer were not brought into compliance immediately. (Hudson Dep. pp. 141-42, 160-61). Further, New Hanover County Jail policy 7.09 ("Policy 7.09") authorizes the "[u]se of physical holds and takedown techniques to gain control of an inmate" in situations where non-forceful means are ineffective. (Def.'s Mot. for Summ. J., Ex. I, p. 3).

The Supreme Court has held that great deference is due the officer faced with a dynamic, rapidly evolving, and potentially violent situation. See, e.g., Saucier, 533 U.S. at 205 (acknowledging that it had previously "set out a test that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene") (internal citation omitted); see also Grayson, 195 F.3d at 697 ("In dealing with such agitated detainees prison officials must not be forced to walk a tightrope and face the prospect of a lawsuit no matter which way they turn.... If we failed to

accord due deference to the officers' efforts, we would give encouragement to insubordination in an environment which is already volatile enough."). Here, where defendant Hudson's actions in subduing Rummer appear reasonable even in "hindsight," there is no genuine issue as to any material fact that suggests that defendant Hudson acted "maliciously and sadistically for the very purpose of causing harm."

Plaintiff alleges that there exists a genuine issue of material fact with respect to the question of whether defendant Hudson verbally addressed Rummer prior to his use of force. Plaintiff points to Cline's testimony regarding what conversation, if any, took place between defendant Hudson and Rummer prior to defendant Hudson's use of force. Cline testified that he did not recall hearing any words pass from defendant Hudson to Rummer, but his testimony falls short of affirmatively asserting that at no time did defendant Hudson warn Rummer or verbally direct him to act in any way.

Cline called his own recollection into question by indicating that his ability to hear any words pass between defendant Hudson and Rummer could have been affected by the other people in the cell, who were verbally requesting Rummer's removal from the cell:

> [Y]ou've got to remember the scene that you got there. You've got a row full of people all on the floor. And then all of a sudden the guard is rushing-you know, the guard is rushing in.

> And so I don't-I don't recall someone saying, well, will you please put your hands behind your back, I'm going to take you out of here, in which they probably could have done ... I didn't hear anything. You know, I-there's other people in this cell. And, you know, there's kind of people saying get him out-you know, talking going on ... it wasn't like a-they came and said, well, how are you doing, Mr. Hummer [sic]; we want to take you out of-I don't recall any conversation that went on like that.

(Cline Dep. pp. 24-26, 81).

Plaintiff puts significant reliance upon Clem v. Corbeau, wherein the Fourth Circuit affirmed the trial court's denial of summary judgment on an excessive force claim where a defendant-officer who shot and killed a man testified that he fired on the victim because he heard a threat, but another officer and a witness who were both at the scene testified that no threat was made. 284 F.3d 543, 551 (4th Cir. 2001). Clem is distinguishable from the instant matter, however. In the case at bar, no less than three people testified to defendant Hudson's verbal warnings, and the sole contradictory evidence is Cline's equivocal testimony, the reliability of which is called into question by Cline himself.

Even accepting as true the fact that defendant Hudson did not verbally address Rummer prior to grasping his arm, Rummer's resistance once initial contact was made would nonetheless entitle defendant Hudson to apply force under Policy 7.09. A "good faith effort to maintain or restore discipline" does not constitute excessive force. Whitley, 475 U.S. at 320. The undisputed facts show that defendant Hudson's actions represented such an effort. "Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury." Id. at 322.

Denying summary judgment on the basis of this single issue of fact would defy the direction provided by the Supreme Court in Saucier. 533 U.S. at 195. Accordingly, whatever conflict exists in the record with respect to this fact fails to rise to the level of a genuine issue of material fact capable of preventing summary judgment under the circumstances presented by this case.

Despite the severity of Rummer's injuries, the court cannot find that defendant Hudson's use of force was malicious or sadistic, aimed towards purposeful causation of harm, or excessive under the circumstances. As such, the use of force does not violate the Constitution, and summary judgment is appropriate.

C. Inadequate Medical Care Under § 1983 Against Defendant Hudson

Defendant Hudson also moves for summary judgment on the basis of qualified immunity with regard to plaintiffs claim of inadequate medical care. Pretrial detainees such as Rummer who complain of inadequate medical care proceed under the Fourteenth Amendment, rather than the Eighth Amendment. Patten v. Nichols, 274 F.3d 829, 834 (4th Cir. 2001). The Fourteenth Amendment rights of pretrial detainees are "at least as great as the Eighth Amendment protections available to a convicted prisoner." Id.

As the court set forth in earlier order, to prevail on an Eighth Amendment claim of inadequate medical care, an inmate must allege acts or omissions sufficiently harmful to constitute deliberate indifference to serious medical needs.[5] To be deliberately indifferent the prison official must not only act recklessly, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994).

Prison officials are deliberately indifferent to serious medical needs only where they completely fail to consider an inmate's complaints or act

[5] A claimant must also objectively show that the injury inflicted or the deprivation of medical care suffered was sufficiently serious. Farmer v. Brennan, 511 U.S. 825, 834 (1994). By order dated July 6, 2006, this court, citing Estelle v. Gamble, 429 U.S. 97, 106 (1976), held that "there appears to be no issue regarding the seriousness of Mr. Rummer's injuries in that such injuries resulted in his death."

intentionally to delay or deny the prisoner access to adequate medical care. Estelle, 429 U.S. at 104. The Eighth Amendment has been violated where treatment is "so grossly incompetent, inadequate or excessive as to Shock the conscience or to be intolerable to fundamental fairness." Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990). Deliberate indifference is a very demanding standard which is not satisfied by mere negligence or malpractice. Id. at 854 (citing Estelle, 429 U.S. at 105-06). "In order to establish a claim of deliberate indifference to medical need, the need must be both apparent and serious, and the denial of attention must be both deliberate and without legitimate penological objective." Grayson v. Peed, 195 F.3d 692, 695 (4th Cir. 1999), cert. denied, Grayson v. Royer, 529 U.S. 1067 (2000). The Fourth Circuit has held that to bring an inadequate medical care claim against a non-medical official, a plaintiff must show that the official was personally involved with a denial of treatment, deliberately interfered with prison doctors' treatment, or tacitly authorized or was indifferent to the prison medical staffs misconduct. Miltier, 896 F.2d at 854 (citing Slakan v. Porter, 737 F.2d 368, 372-73 (4th Cir. 1984), cert denied Reed v. Slakan, 470 U.S. 1035 (1985)).

Plaintiff claims that defendant Hudson violated Rummer's constitutional rights in that defendant Hudson knew that Rummer was seriously injured and, by failing to give complete answers or volunteer information in response to nurse Barfield's questions, defendant Hudson deliberately interfered with Rummer's care. Pl.'s Mem. Resp. Mot. Summ. J. at 10. Plaintiff is unable to point to any facts in the

record that show defendant Hudson intentionally interfered with Rummer's care. Plaintiff relies instead on inference drawn from some inconsistency between the testimony of Barfield and defendant Hudson.

Barfield testified that she did not ask defendant Hudson if Rummer fell, and that she did not need to know how Rummer's glasses broke. Her notes suggest that defendant Hudson told her that scratches occurred when Rummer's glasses broke. Defendant Hudson testified that he did not tell Barfield that the scratches were caused by Rummer's glasses breaking, and that he told Barfield that Rummer "did not fall."

Plaintiff contends that defendant Hudson "was covering up his use ofexcessive force so as to protect himself from punishment." Pl.'s Mem. Opp. Def.'s Mot. Summ. J. at 15. The record shows, however, that defendant Hudson's actions in subduing the noncooperative Rummer were reasonable and complied with jail policy. Inferences from the evidence must be construed in favor of the nonmoving party, but only if they are reasonable. Anderson, 477 U.S. at 255. The uncontroverted testimony illuminates a rapidly evolving sequence of actions involving a number of people concerning the extraction of Rummer from cell 423, his transfer to cell 419, and, ultimately his second transfer to the jail's medical department, and while there is some inconsistency of testimony among witnesses, there is no evidence that shows defendant Hudson acted with deliberate indifference towards Rummer's medical needs.

"It will nearly always be the case that witnesses ... differ over what occurred. That inevitable confusion, however, need not signify a difference of triable fact," Gooden v. Howard County, 954 F.2d 960, 965 (4th Cir. 1992). Here, under the facts and circumstances presented, the minor inconsistencies in otherwise consistent witness accounts fail to give rise to a genuine issue of material fact.

Plaintiff alleges that defendant Hudson possessed an affirmative duty to volunteer information regarding Rummer's possible injury. Pl.'s Mem. Opp. Def.'s Mot. Summ. J. at 15. It is undisputed that very shortly after the takedown, defendant Hudson helped transport Rummer to the jail's on-site medical care facility. (Hudson Dep. pp. 94-96). At the facility, Rummer was examined by Barfield, medicated, and retumed to cell 419 for observation and possible transport. (Barfield Dep. pp. 28-32; Hudson Dep. p. 101). Barfield suspected that Rummer suffered from alcohol withdrawal. (DE # 46-5 (Barfield Notes) p. 2).

Defendant Hudson admitted that he did not provide much information to Barfield. (Hudson Dep. p. 147). Plaintiff contends that defendant Hudson, having taken down Rummer prior to his extraction from cell 423, should have known that Rummer had suffered a head injury, and that defendant Hudson had an affirmative duty to report his knowledge. Pl.'s Mem. Opp. Def.'s Mot. Summ. J. at 15-17. Fourth Circuit case law shows, however, that defendant Hudson, as a non-medical staff member with no apparent medical training, acted reasonably

when he submitted Rummer to trained medical professionals.

In Young v. City of Mt. Ranier, law enforcement officers encountered Young acting strangely in the street and, when he resisted arrest, they sprayed him with pepper spray and restrained him. 238 F.3d 567 (4th Cir. 2001). The officers placed Young face down in restraints in the back of a police car, and transported him to the emergency room. Id. at 570. Young was later found face down and pulseless on the floor of the emergency room. Id. Attempts to resuscitate him failed. Id. An autopsy report showed that Young had PCP in his system at the time of death. Id.

Young's parents sued the individual law enforcement officers and their employers alleging, among other things, that the officers involved were deliberately indifferent to Young's medical needs because they "knew or should have known" of the risks inherent to Young in the situation. Id. The Fourth Circuit, faced with a motion to dismiss for failure to state a claim upon which relief can be granted, noted that the threshold for a showing of deliberate indifference is extraordinarily high. Id. at 575. The court found that mere allegations of deliberate indifference, without more, could not support the parents' claim:

> [T]he complaint simply establishes that Young struggled with law enforcement officers, was sprayed with pepper spray, restrained, transported to a hospital in a prone position, and

> died sometime thereafter. While the complaint alleges that the officers knew or should have known about the potential problems with the use of pepper spray and restraints on PCP users, these allegations, particularly absent any suggestion that Young exhibited any distress during the time he was in the custody of the officers, at most support an inference that the defendants were negligent in some unidentified way. Negligence, however, is insufficient to support a claim of a Fourteenth Amendment violation.

Id. at 577. The court went on to hold that the law enforcement officers' action, in turning Young over to health care providers, was reasonable under the circumstances. Id. at 578 ("We fail to see how such conduct could be considered abandonment, much less deliberate indifference to Young's serious medical needs").

In Grayson, arresting officers delivered a detainee to a detention facility despite the fact that the detainee, in whose possession were found a variety of illegal drugs, was acting irrationally. 195 F.3d at 694. After the detainee became combative at the facility, he was subdued and restrained. Id. The detainee died shortly thereafter, and it was later determined that he had a history of congestive heart failure. Id. The detainee had failed to advise correctional officers of his medical history, however, and the court held that "[t]he law cannot demand

that officers be mind readers." Id. at 695. The Fourth Circuit found that the officers' decision to deliver a confused detainee to a correctional facility that included a 24 hour medical facility was reasonable. Id. Because the officer could reasonably rely on trained staff at the health care facility to care for detainee, the officer was "in no sense deliberately indifferent to [the detainee's] medical need." Id.

In Belcher v. Oliver, a pretrial detainee who manifested no outward signs of depression or risk factors for selfharm nonetheless committed suicide by hanging himself while he was being held, subsequent to his arrest for driving under the influence of alcohol, in a jail holding cell. 898 F.2d 32, 34 (4th Cir. 1990). His estate claimed that the arresting officers were guilty of deliberate indifference to his medical need because they did not screen him for risk or remove his belt or shoelaces. Id. The court held that the officers had no duty to screen every patient, and that the failure to remove belt and shoelaces was, at most, negligent. Id. at 34-35. The court took note of affirmative actions taken by defendants, on behalf of decedent, to secure his "speedy release" so that his daughter could retrieve him from detention, and held that the officers' conduct "could in no way be construed as deliberate indifference." Id. at 35.

In accordance with relevant law, upon the undisputed facts, defendant Hudson was reasonable in believing that he relinquished responsibility for Rummer's well being when he delivered Rummer to qualified health care providers, Grayson, 195 F.3d at 694; Young, 238 F.3d at 578. The court is unable to

discern any affirmative duty to volunteer unrequested information under the circumstances presented. Id. Defendant Hudson's affirmative actions in delivering Rummer to receive medical care relieved him of responsibility. Belcher, 898 F.2d at 34.

Finally, there is no support in the undisputed record for plaintiffs allegation that defendant Hudson must have known that Rummer had a head injury. Plaintiffs medical need, disguised as it was by the symptoms of alcohol withdrawal, was not apparent. The law excuses an officer's failure to attend to any medical condition that is not both "apparent and serious," even when the detainee is acting irrationally, as though impaired. Grayson, 195 F.3d at 695; see also Young, 238 F.3d at 577-78.

To prevail on a claim of deliberate indifference a plaintiff must show not only that an officer knew the facts that might suggest a risk of harm, but also that the officer actually drew the inference necessary to recognize the risk. Farmer, 511 U.S. at 838. Plaintiff here must make an affirmative showing not only that Hudson had before him alleged facts that could have suggested that Rummer might have a head injury, but also that defendant Hudson affirmatively considered those facts and formed a belief that Rummer was at risk. The subjective standard for deliberate indifference is a high one "[b]ut an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as [a constitutional violation]." Id.

The case law sanctions only "deprivations of rights, not errors in judgment, even though such errors may have unfortunate consequences." Grayson, 195 F.3d at 696. That a tragedy occurred in the New Hanover County Jail, resulting in Rummer's death, is without dispute. However, where plaintiff raises no genuine issue of material fact that defendant Hudson actually knew that Rummer was at serious risk for head injury, defendant Hudson is entitled to the protection of qualified immunity and summary judgment is appropriate.

D. Supervisory Liability Claims Under § 1983 Against Defendants Causey, Parker, and Hayes

Where a deprivation of federal rights has occurred, a supervisory employee may be held liable where a plaintiff demonstrates that (1) the supervisor had actual or constructive knowledge of a risk of the constitutional injury, (2) the supervisor was deliberately indifferent to or tacitly authorized the risk, and (3) that an "affirmative causal link" exists between the supervisor's action or failure to act and the particular constitutional injury suffered by the plaintiff." Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994), cert. denied 513 U.S. 814 (1994), and cert. denied Stroud v. Shaw, 513 U.S. 813 (1994). "The plaintiff... assumes a heavy burden in supervisory liability cases." Slakan, 737 F.2d at 373. "Ordinarily, he cannot satisfy his burden of proof by pointing to a single incident or isolated incidents, for a supervisor cannot be expected to promulgate rules and procedures covering every conceivable occurrence within the area of his responsibilities."

Id. Plaintiff argues that defendants Parker and Hayes, in their individual capacities, and defendant Causey, individually and in his official capacity as Sheriff of New Hanover County, are liable as supervisors because they were "at all times relevant herein, responsible for the formulation and execution of policies regarding the treatment of arrestees, detainees, and inmates at the New Hanover County Jail." Compl. ¶ 38. Plaintiff makes reference to policies governing the use of force and restraints and policies governing medical attention after the use of force, but plaintiff offers argument specific only to policies regarding the use of force.

Plaintiff contends that supervisory defendants "knew that those policies were not being followed at the jail," "knew that persons such as Mr. Rummer were at risk for serious injury," and that "[c]learly this failure to adopt and implement uniform, proper policies for the use of force and restraints was a causative factor in the death of Mr. Rummer." Pl. 's Mem. Resp. Mot. Summ. J. at 17-18. Plaintiff's argument fails, however, for several reasons.

The court has found no constitutional violation upon which to base such liability. See sections Band C, above. "If a person has suffered no constitutional injury at the hands of the individual ... officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

In the absence of a constitutional violation, the court need not consider the propriety of any

regulation in question, and supervisory liability is inappropriate. Belcher, 898 F.2d at 36; see also Hinkle v. City of Clarksburg, 81 F.3d 416, 420 (4th Cir. 1996) ("In the absence of any underlying use of excessive force ... , liability cannot be placed on either [other] officers, a supervisor, or the City"); Giancola v. West Virginia Dep't of Public Safety, 830 F.2d 547, 550 (4th Cir. 1987) ("Ifthe officers' actions were in compliance with constitutional standards, there is no liability on the part ofthe officers or the employing entities.").

Even assuming that Rummer's constitutional rights were violated as a result of defendant Hudson's use of force and the subsequent medical treatment, plaintiff has failed to provide any factual support for the theory that supervisory defendants were aware that jail policies created a risk, or for the theory that there exists "an affirmative causal link" between the policies and Rummer's injury.

Plaintiff has failed to provide any evidence that defendants Parker, Hayes, or Causey were responsible for policies, practices, or customs which were a direct and proximate cause of the alleged inadequate treatment of Rummer's medical needs, or that any such policies resulted in harm to Rummer. In addition, plaintiff cites to no other instances of similar conduct or any general or widespread problem related to medical attention. To establish supervisory liability, plaintiff must show that the policy or lack thereof created a "pervasive and unreasonable risk of harm." Stroud, 13 F.3d at 799. Plaintiff makes no factual showing to support such a finding.

With respect to the use of force, detailed and specific procedures are contained in Policy 7.09. Plaintiffs own expert testified that Policy 7.09 is a reasonable example of proper correctional practice. (Katsaris Dep. pp. 111, 166). Defendant Causey testified to the widespread use of handcuffs in detention facilities as a safety measure for officers and inmates alike, and plaintiffs expert corroborated this testimony. (Causey Dep. pp. 74, 78; Katsaris Dep. p. 237). To support liability on this claim, the policy complained of must generate "an unreasonable risk of harm of constitutional injury." Stroud, 13 F.3d at 799. Plaintiff has failed to make such a showing.

Further, plaintiff has failed to demonstrate how the use of the handcuffs within the New Hanover County Jail is causally linked to the particular constitutional injury allegedly suffered by Rummer, since the injury allegedly resulted from defendant Hudson's maneuver, not his use of handcuffs. At the time Rummer was taken down, only one of his hands was cuffed. (Hudson Dep. p. 58; Hansen Aff. ¶ 5). Defendant Hudson testified that Rummer landed on his left arm, which was not secured by handcuffs. (Hudson Dep. p. 58). Aside from plaintiffs bare allegation that there is a causal link, the record contains no support for such a claim.

Plaintiff bears a heavy burden to make a showing of supervisory liability. Slakan, 737 F.2d at 373. On a motion for summary judgment, the court tests for a "genuine issue" through recourse to the relevant law, "view[ing] the evidence presented through the prism of the substantive evidentiary

burden." Anderson, 477 U.S. at 254. Plaintiff must rely on more than "airy generalities, conclusory assertions and hearsay statements." Roane, 378 F.3d at 400. Here, where plaintiffs burden is high and factual support is nonexistent on several necessary elements of the claim, summary judgment is appropriate.

In accordance with the foregoing, it is established that as a matter of law, defendants Parker, Hayes, and Causey are not liable under a § 1983 claim of supervisory liability, and accordingly, plaintiff's supervisory liability claims are dismissed.

F. State Wrongful Death Claim Against Defendants Hudson, Causey, Parker, and Hayes

Defendants Hudson, Causey, Parker, and Hayes also seek to dismiss, pursuant to Rule 56, plaintiffs wrongful death claim under North Carolina General Statute section 28A-18-2(a). Plaintiff argues that a court ruling on this claim is premature because discovery to this point has been limited to qualified immunity, and no discovery specifically related to this claim has been undertaken. In the alternative, plaintiff argues that the elements of a state wrongful death claim have been established.

North Carolina General Statute section 28A-18-2(a) provides in relevant part:

> When the death of a person is caused by a wrongful act, neglect or default of

> another, such as would, if the injured person had lived, have entitled him to an action for damages therefore, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages. to be brought by the personal representative or collector of the decedent;

N.C. Gen. Stat. § 28A-18-2(a).

The Fourth Circuit has held that where an officer's actions "were, as a matter of law, reasonable in the circumstances of [the] case, they cannot be negligent or wrongful, as required by N.C. Gen. Stat. § 28A-18-2(a)." Sigman v. Town of Chapel Hill, 161 F.3d 782, 789 (4th Cir. 1998). Having determined that defendants actions were reasonable, the court finds that "plaintiffs have no state law claim." Id. Accordingly, plaintiffs wrongful death claim against defendants is dismissed.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment (DE # 91) is GRANTED as to plaintiffs remaining claims. The remaining motions of or relating to trial issues, are DENIED as MOOT, where the Clerk of Court is directed to discontinue the case from the trial docket and now to CLOSE it.

SO ORDERED, this 8th day of May, 2008.

/s/
LOUISE W. FLANAGAN
Chief United States District Judge